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In the Supreme Court of the United States

No. 1370.

OCTOBER TERM, 1970.

ALICE MARIE LAMP,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION
and
DEN NORSKE AMERIKALINJE, A/S,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

COUNTER QUESTIONS PRESENTED.

1. Is the rule of the United States Court of Appeals for the Sixth Circuit that an award in admiralty of prejudgment interest is a matter committed to the discretion of the District Court in conflict with prior decisions of this Court or with decisions of other Courts of Appeals?

2. On all the facts, was the United States Court of Appeals for the Sixth Circuit correct in deciding that an award of prejudgment interest in this case amounted to an abuse of discretion?

3. Should *The Scotland,* 118 U.S. 507 (1886), be overruled and the lower courts be deprived of their discretion over awards of prejudgment interest?

COUNTER STATEMENT OF THE CASE.

This litigation arises out of a collision between the Steamship *Cedarville*, a Great Lakes bulk carrier, and the Motor Vessel *Topdalsfjord* in the Straits of Mackinac on May 7, 1965. This collision resulted in the sinking of the *Cedarville* and the death of ten of her crew members. A third vessel, the *Weissenburg*, also participated in the circumstances which led to the collision.

Following the sinking, in the spring and summer of 1965, the owner of the *Cedarville*, United States Steel Corporation ("U.S. Steel"), the owner of the *Topdalsfjord*, Den Norske Amerikalinje A/S ("Den Norske") and the owner of the *Weissenburg* each filed a Petition for Exoneration from and/or Limitation of Liability. These proceedings were consolidated and, over the succeeding two years, liability for the loss sustained as a result of the collision was contested among the three shipowners and twenty personal injury and death claimants. All discovery into the question of the damages sustained by the claimants was stayed pursuant to an order of the District Court entered on the motion of the personal injury and death claimants.* On May 31, 1967, the parties entered into a stipulation which resolved all pending issues except claims for punitive damages against U. S. Steel and the determination of the amount of the compensatory damages to be awarded.

Discovery on the question of compensatory damages was further stayed pending the outcome of the trial against U. S. Steel on the question of punitive damages.

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* See Order of March 13, 1967 where the Court ordered that:

> "the petitioning vessels shall be and hereby are proscribed from pursuing any discovery procedure which is designated to elicit information relating to the question of damages."

In October of 1967, the District Court found U. S. Steel liable for punitive damages. This decision was reversed by the Court of Appeals for the Sixth Circuit, *United States Steel Corporation v. Fuhrman,* 407 F.2d 1143 (6th Cir., 1969). The claimants' Petitions for a Writ of Certiorari were denied. *Fuhrman v. United States Steel Corporation,* 398 U.S. 958 (1970).

Following its decision on the question of punitive damages, the District Court appointed two Commissioners to hear evidence on the question of compensatory damages.

Ten death claims and twenty personal injury claims had been filed. Once the stay order was lifted, discovery followed and this led to settlement negotiations with all claimants and their attorneys by the shipowners. Subsequently, five death claims, involving claimants represented by three different sets of attorneys, and thirteen personal injury claims, involving claimants represented by four sets of attorneys, were resolved. The terms of these settlements were described as "generous" by the District Court.* This left pending five death claims and seven personal injury claims.

Simultaneous and overlapping discovery and evidentiary hearings on the question of compensatory damages occurred from December 13, 1967 to November 7, 1968. On May 7, 1969, a report was filed by the Commissioners recommending compensatory damage awards and, on July 9, 1969, this report was confirmed by the District Court without change and judgments were entered against the shipowners.

The day following the entry of the judgments, the shipowners, Den Norske and U. S. Steel, filed notices of appeal and each of the claimants thereafter filed cross-

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* Docket Entry 455, Transcript of Proceedings before Judge Connell, July 18, 1969, pp. 38, 40.

appeals. The various appeals were briefed and oral argument was had before the Court of Appeals for the Sixth Circuit on April 15, 1970. On December 23, 1970, the Court of Appeals filed its decision vacating the judgment of the District Court and remanding the cases for further proceedings consistent with its opinion.

The claim of Alice Marie Lamp was one of the five death claims involved in the proceedings below. Mrs. Lamp was awarded $425,084 by the District Court; of this award, $23,174 was for prejudgment interest.

In discussing the award of prejudgment interest, the District Court characterized its decision as a rule to "apply to all cases" and stated (22): *

> "[T]he discipline of a prejudgment interest payment will pressure, legitimately, the parties involved to proceed with dispatch to final judgment."

The Court continued (22):

> "Happily, in these proceedings of the *Cedarville,* before the Commissioners, all parties and their counsel did proceed expeditiously and needed no such discipline."

The District Court also recognized that its decision (21):

> "squarely contradicts the holding of our superior Sixth Circuit Court of Appeals in *Cleveland Tankers v. Tierney,* 169 F.2d 622 (6th Cir., 1948)."

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* References in parentheses are to Petitioner's Appendix.

ARGUMENT.

I.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THIS COURT, WITH ITS OWN PRIOR DECISIONS AND THE DECISIONS OF THE COURTS OF APPEALS OF OTHER CIRCUITS.

Petitioner's argument that the decision below is in conflict with the decisions of this Court and with decisions of the Court of Appeals for the Sixth Circuit and other Courts of Appeals attempts to create an illusion of conflict where, in fact, none exists. All circuits, including the Sixth Circuit in this case, follow the rule of *The Scotland,* 118 U.S. 507 (1886), that an award of prejudgment interest in admiralty is a matter for the discretion of the Court.

To support her argument of intra-circuit conflict, Petitioner calls attention to the case of *Reiss Steamship Company v. United States Steel Corporation,* 427 F.2d 1152 (6th Cir., 1970). The circumstances surrounding the *Reiss* decision are significant in determining how the *Reiss* case and the decision below in *The Cedarville* are to be compared and if, as Petitioner contends, there is a conflict.

Two of the three judges on the panel in the *Reiss* case, Judges Weick and Peck, sat on the panel in *The Cedarville.* Both cases were before the Court of Appeals at the same time. The *Reiss* appeal was filed after that in *The Cedarville* but the *Reiss* decision was handed down prior to *The Cedarville.* In view of this overlap, it is inconceivable the *Cedarville* Court did not have the *Reiss* case in mind when it decided the *Cedarville.*

A close reading of the two cases *in pari materia* discloses no inconsistency. In the earlier *Reiss* case, the Court of Appeals ruled that the question of prejudgment

interest is a matter within the sound discretion of the Court. The *Reiss* Court stated at pages 1153 to 1154:

> "This Court has approved denial of prejudgment interest in a 'solely at fault' case involving property damage, *Great Lakes Towing Co. v. Kelley Island Lime & Transport Co.*, 176 F. 492 (6th Cir., 1910), and in a personal injury action, *Cleveland Tankers v. Tierney*, 169 F.2d 622 (6th Cir., 1948). In *Great Lakes Towing Co.*, however, we stated that the rule as to the awarding of prejudgment interest was not a fixed one but rested within the discretion of the Court and would not be reviewed unless it has been 'palpably abused.' 176 F. at 498.
>
> An award of prejudgment interest is generally within the discretion of the Court. *The Scotland*, 118 U.S. 507, 518-519, 6 S. Ct. 1174, 30 L. Ed., 153 (1886); *O'Donnell Transport Co. v. City of New York*, 215 F.2d 92, 95 (2d Cir., 1954); *The Wright*, 109 F.2d 699 (2d Cir., 1940); *Kawaski Zosensho v. Cosulich Societa Triestina di Navigazione*, 11 F.2d 836 (5th Cir., 1926)."

Further, in *Monsanto Chemical Co. v. No. 3 Bull Towing Company*, 326 F.2d 18 (6th Cir., 1963), the Court of Appeals for the Sixth Circuit, with Judge Weick a member of the panel, stated at page 26:

> "Allowance of interest in admiralty is discretionary with the Court; . . ."

There is nothing inconsistent with this rule in the decision here under attack. There is no statement that in an appropriate case a District Court of the Sixth Circuit might not in its discretion make an award of prejudgment interest in a maritime death case. Rather, here, on the particular circumstances of this case, where discovery on the issue of damages was delayed at the instance of the claimants, where most claims were settled on terms described by the District Court as "generous" long prior

to judgment, and where the District Court itself specifically found that shipowners proceeded expeditiously and did not need the discipline of a prejudgment interest payment, the Court held that an award of prejudgment interest amounted to an abuse of discretion.

Petitioner claims that the decision below conflicts with this Court's ruling in *The Scotland, supra,* that an award of prejudgment interest in admiralty is a matter for the discretion of the Court. As discussed above, this is incorrect. In fact, the Court below, in support of its decision, relied upon and recognized the precedent of *Cleveland Tankers v. Tierney,* 169 F.2d 622 (6th Cir., 1948) which Petitioner characterizes as merely restating the rule of *The Scotland* (P. Br., p. 7).

With respect to the asserted conflict with the Court of Appeals for the Second Circuit, that Court said in *Moore-McCormack Lines, Inc. v. Richardson,* 295 F.2d 583 (2d Cir., 1961), cert. den. 368 U.S. 989 and 370 U.S. 937 (1962), at page 593:

> "Under admiralty practice, the District Court has a measure of discretion in allowing and fixing moratory interest."

See also *The Wright,* 109 F.2d 699 (2d Cir., 1940), where the Court stated at page 702:

> "It is stated repeatedly that the award of interest in admiralty is a matter of the Court's discretion."

There is nothing in *Petition of the City of New York,* 332 F.2d 1006 (2d Cir., 1964), cert. den. sub. nom. *City of New York v. Bernstein,* 379 U.S. 922 (1964), inconsistent with these cases and, in fact, both are cited with apparent approval at page 1008.

Similarly, there is no conflict with the decision of the Court of Appeals for the Fourth Circuit. In *Gardner v. National Bulk Carriers, Inc.,* 333 F.2d 676 (4th Cir.,

1964), the case cited by Petitioner as illustrating the conflict, the Court of Appeals at page 677 approved a "*discretionary* allowance of interest on the award from the date of death to the date of judgment."

In *Canova v. Travelers Insurance Co.*, 406 F.2d 410 (5th Cir., 1969), cert. den. 396 U.S. 832 (1970), the Court of Appeals for the Fifth Circuit affirmed the decision of the lower court that no award of prejudgment interest was to be made in a maritime personal injury case, stating at page 411:

> "If the Maritime law applies, the matter of pre-judgment interest rests within the sound discretion of the trial court."

In *The President Madison,* 91 F.2d 835 (9th Cir., 1937), the Ninth Circuit decision to which Petitioner refers (P. Br., 9-10), the Court expressly states at page 847 that an award of interest is "within the discretion" of the Court and may be refused under the "peculiar facts" of the case.

In short, the rule with respect to prejudgment interest is the same in all Circuits and is the rule of *The Scotland,* that an award of prejudgment interest in a maritime case is a question for the sound discretion of the Court.

This discretion may be exercised in different ways in different cases depending upon the facts of the case before any given Court. However, when a decision is committed to the discretion of the Court and is to be based upon a consideration of the particular facts of each case before each Court, by the very nature of the decision to be made, a conflict between various Circuits is impossible because implicit in such an approach is the possibility of results which vary from case to case. A true conflict may only arise out of a variation in the choice of governing principles of law.

II.

A REVIEW OF THE FACTS OF THIS CASE DEMONSTRATES THE DECISION OF COURT OF APPEALS ON PREJUDGMENT INTEREST WAS CORRECT.

Upon a full review of the facts, it is apparent that the Court of Appeals correctly concluded an award of prejudgment interest in this case amounted to an abuse of discretion.

The nature of the proceedings here made such an award inappropriate. As the same District Judge involved in these proceedings stated in his decision in *Reiss Steamship Company v. United States Steel Corporation,* Memorandum Opinion of Judge Connell, In Admiralty, A. 64-56, N.D. Ohio, E.D., October 6, 1969:

> "The law, as stated in most instances, discourages the granting of interest prior to the final decree where the questions arise concerning the amount of damage, the type of damage and in situations where liability is contested among several defendants."

This was the situation here. Liability was contested for two years among three shipowners and some twenty claimants and there were questions as to the type and amount of damages sustained.

Further, the District Court itself found that circumstances which might call for the "discipline of the prejudgment interest payment" were not present here because (22):

> "Happily, in these proceedings of the *Cedarville* before the Commissioners, all parties and their counsel did proceed expeditiously and needed no such discipline."

Any undue delay in making the awards or in settling the cases can be traced directly to the actions of the claimants themselves. As noted earlier, the District Court,

upon the motion of the claimants, entered an order forbidding any discovery on the question of compensatory damages until the questions of the shipowners' liability for such damages and U. S. Steel's liability for punitive damages had been resolved. In the absence of such discovery, it was, of course, impossible for the shipowners to familiarize themselves with the nature of the claims and enter into any meaningful discussions with the claimants regarding settlement or to prepare to defend the claims until the necessary discovery had been completed. For this delay, the claimants have only themselves to blame.

Once discovery was allowed to proceed, most of the claims were settled quickly. The District Court itself styled these settlements as "generous."

With respect to those claims which could not be settled, the shipowners proceeded with discovery and evidentiary hearings simultaneously in an effort to bring the claims to judgment as soon as possible.

It is evident that the District Court realized that if the discretionary rule of prejudgment interest enunciated in *The Scotland,* 118 U.S. 507 (1886), and *Cleveland Tankers v. Tierney,* 196 F.2d 622 (6th Cir., 1948), controlled, no award of prejudgment interest would have been appropriate because of the "expeditious" manner in which the shipowners proceeded and the other circumstances of the case. In an attempt to justify its award, it undertook to overrule the *Scotland* and *Tierney* cases by promulgating a rule requiring the mandatory award of prejudgment interest in all maritime death cases.

Many courts have recognized that awards of prejudgment interest are not to be made in all cases. *Cleveland Tankers v. Tierney, supra; Great Lakes Towing Co. v. Kelley Island Lime & Transport Co.,* 176 F. 492 (6th Cir., 1910); *La Capria v. Compagnie Maritime Belge,* 286 F.

Supp. 980 (S.D. N.Y., 1968), aff'd. 427 F.2d 244 (2d Cir., 1970); *Canova v. Employers Mut. Liability Ins. Co.*, 301 F. Supp. 738 (E.D. La., 1967), aff'd *Canova v. Travelers Insurance Co.*, 406 F.2d 410 (5th Cir., 1969), cert den. 396 U.S. 832 (1970); *Candiano v. Moore-McCormack Lines, Inc.*, 251 F. Supp. 654 (S.D. N.Y., 1966), aff'd, 382 F.2d 961 (2d Cir., 1967), cert. den. 390 U.S. 1027 (1968); *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958 (5th Cir., 1969) and *Duvernay v. Alcoa Steamship Company*, 217 F. Supp. 698 (E.D. La., 1963). See also cases cited in *The President Madison*, 91 F.2d 835 (9th Cir., 1937) at page 847.

This was such a case.

III.

THE MANDATORY IMPOSITION OF PREJUDGMENT INTEREST WOULD BE UNPRECEDENTED AND WOULD DEPRIVE LOWER COURTS OF DESIRABLE FLEXIBILITY.

In her last argument, Petitioner abandons her previous position that awards of prejudgment interest should be discretionary and inconsistently argues, for the first time in this or any other Court, for the adoption by this Court of a mandatory rule imposing prejudgment interest in all maritime injury or death cases.

The fact that the present rule that such awards are discretionary traces its roots back almost a century to *The Scotland*, 118 U.S. 507 (1886) and has been applied in literally thousands of cases with satisfactory results is eloquent testimony of the viability and desirability of the present rule.

A rule that such an award is discretionary provides the lower courts with flexibility and a capacity to adapt to the particular circumstances of the cases before them, a characteristic which has long been a hallmark of the admiralty courts and of American courts generally. Peti-

tioner cites situations where awards of prejudgment interest might be desirable. On the other hand, as discussed above, in many other cases, including the instant case, such an award should not be made.

The present rule allows the lower court to take all of the relevant factors into account and to take whatever action is appropriate in light of the facts of the particular case before it, subject to the power of Courts of Appeals to review its decision. The rule urged by Petitioner would impose a regrettable rigidity upon the lower courts; the undesirability of such a situation has been recognized by the adherence of the admiralty courts to the discretionary rule for almost a century.

Similarly, there is no necessity for overruling or modifying the rule of discount for future damages enunciated in *Chesapeake & Ohio Ry. v. Kelly,* 241 U.S. 485 (1916); this rule is applied independently of the Court's exercise of its discretion in admiralty in allowing or disallowing prejudgment interest.

IV.

THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW A RELATIVELY UNIMPORTANT FACTUAL QUESTION WHICH WAS FULLY REVIEWED AND CORRECTLY DECIDED BELOW.

The award of the District Court to Mrs. Lamp totalled $425,084.00. Of this total, $23,174.00 was awarded as prejudgment interest. Petitioner attempts to single out of the award for separate consideration by this Court a single element constituting only 5% of the total awarded Mrs. Lamp by the District Court.

Further, the main thrust of Petitioner's argument is not that the rule of the Court of Appeals for the Sixth Circuit is incorrect, but that it was erroneously applied

in this case. The facts relevant to this question have already received the consideration of two lower courts. A review of the decision of the Court of Appeals on this point would necessarily involve consideration once again of all the factors which led to the award below. Moreover, this Court would make this review in a case where there is no final judgment extant, the Court of Appeals having vacated the judgment entered by the District Court and remanded the case for further proceedings and the computation and entry of a new judgment.

In connection with this Court's consideration of the Petition, the words of Mr. Justice Frankfurter, in his dissenting opinion in *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957), are patently pertinent. He stated at pages 546 to 547:

> "It is, I believe, wholly accurate to say that the Court will be enabled to discharge adequately the vital, and, I feel, the increasingly vital, responsibility it bears for the general welfare only if it restricts its reviewing power to the adjudication of constitutional issues or other questions of national importance, including therein settlement of conflict among the circuits. Surely it was this conviction, born of experience, that led the Court to ask of Congress that of the great mass of litigation in the state and federal courts only those cases should be allowed to be brought here that this Court deemed fit for review. Such was the jurisdictional policy accepted by Congress when it yielded to the Court's realization of the conditions necessary for its proper functioning."

It is well established this Court does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). See also *Southern Power Co. v. North Carolina Public Service Co.*,

263 U.S. 508 (1924) and *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1918) where this Court at first granted certiorari, but dismissed the writs as improvidently granted when a closer examination of the issues revealed the appeals concerned factual questions.

Petition of Marina Mercante Nicaraguense, 248 F. Supp. 15 (S.D. N.Y., 1965), modified 364 F.2d 118 (2d Cir., 1966), cert. den. 385 U.S. 1005 (1967), *Petition of Moore-McCormack Lines, Inc.*, 184 F. Supp. 585 (S.D. N.Y., 1960), modified in part *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir., 1961), cert. den. 368 U.S. 989 and 370 U.S. 937 (1962), and *Petition of City of New York*, 332 F.2d 1006, cert. den. sub nom. *City of New York v. Bernstein*, 379 U.S. 922 (1964), were all maritime wrongful death cases involving a review of the computation of damages where certiorari was denied.

The instant case presents an *a fortiori* situation to these decisions because the issue which Petitioner here seeks to have reviewed is a single relatively unimportant factual question turning upon a consideration of the entire record of the case, and one which has been passed upon by two lower courts and correctly decided.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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